82-930

In The

Supreme Court of the United States

OCTOBER TERM, 1981

PEOPLE OF THE STATE OF NEW YORK, PETITIONER

v.

WAYNE T. NELSON

PETITION FOR WRIT OF CERTIORARI TO THE STATE OF NEW YORK COURT OF APPEALS

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To the Honorable, Chief Justice and Associate Justices of the Supreme Court of the United States:

People of the State of New York, the Petitioner herein, pray that a writ of certiorari issue to review the remittur, Appendix at Page A2, which is the Order of the State of New York Court of Appeals entered in the above entitled case of *People v. Wayne T. Nelson* in the Office of the Albany County Clerk on October 7, 1982.

QUESTIONS PRESENTED

Does the decision of the New York State Court of Appeals, *People v. Nelson,* violate the Fourth Amendment of the United States Constitution?

Does the decision of the New York State Court of Appeals, *People v. Nelson,* violate the Ninth and Fourteenth Amendments of the United States Constitution and the right of citizenry thereunder to personal safety by preventing police from asking questions of suspicious persons in public?

PARTIES

The People of the State of New York and Wayne T. Nelson are the only parties herein.

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OCTOBER TERM, 1982

No.

PEOPLE OF THE STATE OF NEW YORK, PETITIONER

v.

WAYNE T. NELSON

PETITION FOR WRIT OF CERTIORARI TO THE STATE OF NEW YORK COURT OF APPEALS

OPINIONS BELOW

The decision of the State of New York Court of Appeals, of October 7, 1982, in ____ NY2d ____, is attached hereto in the Appendix at page A1 and that court's remittur is at A2. The opinion of the New York State Appellate Division of the Supreme Court, Third Department, decided July 16, 1981 is in 83 AD2d 689 and is in the Appendix herein at pages A4-A6. The decision of Albany County Court Judge John J. Clyne, dated November 12, 1979, is in the Appendix at pages A7-A8.

JURISDICTION

The decision of the State of New York Court of Appeals was made on October 7, 1982 and the order with respect thereto, which is called a remittitur, was entered in the Office of the Albany County Clerk on October 7, 1982, and is in the Appendix at A2. The jurisdiction of the Supreme Court is invoked under Title 28 U.S.C.A. §1257[3] on the grounds that the State of New York Court of Appeals decision in *People v. Nelson* violates the Fourth, Ninth and Fourteenth Amendments of the United States Constitution.

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provisions involved are the: Fourth Amendment of the United States Constitution, which provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized." The Ninth Amendment of the United States Constitution, which provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The Fourteenth Amendment, Section 1 of the United States Constitution which provides: "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF MATERIAL FACTS

At approximately 8:00 p.m. on March 21, 1979, New York State Police Officer Michael Guiry was patrolling in his police vehicle when he noticed the respondent walking in a northerly direction on Morningside Drive in the Town of Guilderland, County of Albany, State of New York. The area in which the respondent was walking was strictly residential. There were no streetlights in the area and visibility was difficult. Upon observing the respondent, Officer Guiry noticed that there were bulges on both sides of his jacket underneath his arms and that he was walking in a "hunched" position. His suspicion aroused, Officer Guiry put on his vehicle's high beams and shone his spotlight onto the ground in such a manner as to throw some light onto the respondent. Officer Guiry then said to the respondent "Hi, how are you?" and "What is your name?" The respondent stopped, gave his name, and looked up and down the street. Officer Guiry exited his vehicle, asked the respondent for identification, and shone his flashlight upon the respondent. At that time Officer Guiry observed a large plastic bag containing a green vegetable substance protruding from the respondent's left chest pocket. At a Suppression Hearing, defendant acknowledged that the green vegetable substance was marihuana and that he knew Officer Guiry was a State Police Trooper when he first saw him. Officer Guiry ordered the respondent to empty his pocket. When the respondent refused to do so Officer Guiry advised him that he was under arrest and, after a small struggle, the respondent was handcuffed and searched. Various items were seized from the respondent's person and in a subsequent search conducted at the police station additional items were seized.

The respondent on May 22, 1979, made a motion to suppress the items seized from him on the ground that police had no probable cause to justify their stopping him. On September 28 and November 5, 1979, the Hon. John J. Clyne, Albany County Court Judge, conducted a suppression hearing. In a decision dated November 12, 1979, Judge Clyne denied the respondent's suppression motion, concluding that Officer Guiry "was justified in making the initial inquiry and upon observing a bag containing green vegetation protruding from defendant's pocket was justified in requesting defendant empty his pockets". Subsequently, the respondent pled guilty to the crime of criminal possession of a controlled substance in the third degree and received as sentence a maximum term of life imprisonment with a minimum period of imprisonment of five years.

On July 16, 1981 the New York State Appellate Division of the Supreme Court, Third Department, affirmed the respondent's conviction without opinion, the Hon. Ann T. Mikoll dissenting. On October 7, 1982, the New York State Court of Appeals reversed the order of the Appellate Division, vacated the respondent's conviction and plea, and granted the respondent's suppression motion "for reasons stated in the dissenting memorandum of Justice Ann T. Mikoll at the Appellate Division."

POINT I

The decision of the New York State Court of Appeals, *People v. Nelson*, violates the Fourth Amendment of the United States Constitution.

A. *The Decision of the New York State Court of Appeals,* People v. Nelson, *was Based Upon an Interpretation of the Fourth Amendment of the United States Constitution.*

The Court of Appeals reversed the order of the Appellate Division "for reasons stated in the dissenting memorandum of Justice Ann T. Mikoll at the Appellate Division". In her dissent while Judge Mikoll did not expressly state that her opinion was based upon an interpretation of the Fourth Amendment of the United States Constitution, or whether it was based upon New York State Constitutional Law obviously, it was solely based on the Fourth Amendment of the United States Constitution; Judge Mikoll cited three cases in her opinion, *People v. Corrado,* 22 NY2d 308, *People v. DeBour,* 40 NY2d 210, and *People v. Howard,* 50 NYS2d 583, all of which dealt with Federal Constitutional principles. Section 12 of Article I of the New York State Constitution is worded identically with the Fourth Amendment of the United States Constitution, and the former has never been interpreted as providing greater protections than the latter. In *People v. Belton,* 55 NY2d 49, the Court of Appeals noted that it had power to interpret Section 12 of Article I of the New York State Constitution as providing greater protections than the Fourth Amendment of the United States Constitution, but it declined to do so at that time and since that time. Because the New York State Court of Appeals

[1] In *People v. Belton,* 50 NY2d 447, the New York State Court of Appeals held that where a police officer stopped a vehicle for speeding and, upon approaching the vehicle, smelled marijuana and observed marijuana in the vehicle, it was a violation of Belton's rights under the Fourth Amendment of the United States Constitution for the officer to make a warrantless search of the pockets of Belton's jacket, which was left lying on the back seat of the vehicle. This court reversed in *New York v. Belton,* 453 US454.

has never in the past expanded upon the protections provided by the Fourth Amendment of the United States Constitution, and did not take the opportunity to do so in the case at bar, it is clear that the decision in the present case was based upon an interpretation of the Fourth Amendment of the United States Constitution.

B. ***The Decision of the New York State Court of Appeals,* People v. Nelson, *Improperly Interprets the Fourth Amendment of the United States Constitution.***

1. *Officer Guiry's asking the respondent for identification did not constitute a seizure within the meaning of the Fourth Amendment of the United States Constitution.*

In *Terry v. Ohio,* 392 US 1, this Court stated at page 19, footnote 16, that ". . . not all personal intercourse between police and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred". As stated in *United States v. Mendenhall,* 446, US 544, 553-54:

> "The purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but 'to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals'. *United States v. Martinez-Fuerte,* 428 US 543, 554, 49 L.Ed.2d 1116, 96 Supreme Court 3074. As long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would under the Constitution require some particularized and objective justification".

Herein it is clear that Officer Guiry did not "seize" the respondent by merely asking him for identification. Prior to observing a bag of green vegetation that the respondent himself admitted was marijuana, Officer Guiry neither displayed a

weapon nor physically touched the respondent. There is no indication in the record that Officer Guiry's tone of voice was such that compliance with his request might be compelled. In sum, there was simply no basis for the Court of Appeals to conclude that the respondent was "seized" when Officer Guiry asked him for identification.

2. *Even if Officer Guiry's request for identification did effect a "seizure", the respondent's Fourth Amendment rights were not violated since Officer Guiry had reasonable suspicion that the respondent was engaging in criminal activity.*

In determining whether an investigative stop violates the Fourth Amendment, this Court "has emphasized [i] the public interest served by the seizure, [ii] the nature and scope of the intrusion, and [iii] the objective facts upon which the law enforcement officer relied in light of his knowledge and expertise" (*United States v. Mendenhall*, 446 US 544 at 561 [concurring opinion of Mr. Justice Powell]). Examining the present case in light of those considerations clearly displays that any "seizure" herein was reasonable. First, the public's interest in the safety of their persons as well as their homes is greatly served when a police officer briefly and unobtrusively requests identification from a person seen walking at night on a dark street in a strictly residential area. For a police officer to pass by such a person would be a shirking of his duties. Second, it is clear that Officer Guiry's simple request for identification was a truly minimal intrusion. In *United States v. Mendenhall, supra,* Mr. Justice Powell stated in his concurring opinion at pages 562-563:

> "The intrusion in this case was quite modest. Two plain-clothes agents approached the respondent as she walked through a public area. The respondent was near airline employees from whom she could have sought aid had she been accosted by strangers. The agents identified themselves and asked to see some identification. One

> officer asked respondent why her airline ticket and her driver's license bore different names. The agent also inquired how long the respondent had been in California. Unlike the petitioner in Terry, supra, at 7, 20 L.Ed.2d 889, 88 S Ct 1868, 44 Ohio Ops 2d 383, the respondent was not physically restrained. The agents did not display weapons. The questioning was brief. In these circumstances, the respondent could not reasonably have felt frightened or isolated from assistance."

The intrusion in the case at bar was at least as modest as that in *Mendenhall*. Third, the fact that the respondent was walking through a residential area at night in a "hunched" position with "bulges" under his arms clearly would warrant a man of reasonable caution to believe that the respondent had engaged or was about to engage in criminal activity. As this Court stated in *Brown v. Texas*, 443 US at 52, n 2: "a trained, experienced police officer [may be] able to perceive and articulate meaning in given conduct which would be wholly innocent to the untrained observer". Although Officer Guiry's observations of the respondent probably would not have justified a full-blown search, no such intrusion was made herein until after Officer Guiry observed marijuana protruding from the respondent's pockets, at which time probable cause for an extensive search clearly existed. Thus, it is respectfully submitted that even if Officer Guiry's request of identification did effect a "seizure", the respondent's Fourth Amendment rights were not violated since Officer Guiry had reasonable suspicion that the respondent was engaging in criminal activity.

POINT II

***People v. Nelson* violates the Ninth and Fourteenth Amendments of the United States Constitution and the right of citizenry thereunder to personal safety, and should be held unconstitutional.**

The criminal conviction herein is Third Degree Criminal Possession of a Controlled Substance in violation of New York State Penal Law Section 220.16(9) for the possession as stated in the Indictment of "five milligrams or more of Lysergic Acid Diethylamide"; this was an A-III felony for which defendant received a maximum sentence of life with a minimum period of imprisonment of five (5) years. While this conviction, which was reversed by the New York State Court of Appeals, is of some importance, the impact of the decision itself upon law enforcement agencies in New York and the resulting personal safety of the citizens of New York State is of paramount importance. All police in New York State receive a manual which includes holdings of cases relating to their police duties. The decision herein by the Court of Appeals will guide police in New York State in their daily duties of detecting crime and enforcing the criminal laws of the State of New York.

It seems obvious that Police Officer Guiry had a duty to inquire, because of the defendant's suspicious actions and it would also seem he had a further duty to thereafter arrest defendant. The decision in *People v. Nelson* will undoubtedly govern police in New York State on their daily patrols where they see suspicious activities which a reasonable person would investigate. Crimes which police inquiry would often frustrate will undoubtedly occur resulting in injury to citizens in New York State.

The Ninth Amendment of the United States Constitution provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the People." The purpose of this Amendment is to guarantee to the People those rights inherent to citizenship in a Democracy which are not specifically enumerated in the Bill of Rights. *Griswold v. Connecticut,* 381 US 479, 488-89, 490-91 (1965) (Goldberg, J., Concurring). *United States v. Cook,* 311 F. Supp. 618 (D.C. Pa., 1970). It is respectfully submitted that this Amendment is broad enough in scope to encompass a right to personal safety on behalf of the People of the State of New York.

Justice Goldberg, with whom Justice Brennan and the then Chief Justice Warren joined, discussed the Ninth Amendment at length in his concurring opinion in *Griswold v. Connecticut,* 381 US 479 (1965). Justice Goldberg first emphasized at 488-89:

> The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments . . . .
>
> [The Amendment] was proferred to quiet expressed fears that a bill of specifically enumerated rights could not be sufficiently broad to cover all essential rights and that the specific mention of certain rights would be interpreted as a denial that others were protected.

Continuing, Justice Goldberg explained at 490-91:

> While this Court has had little occasion to interpret the Ninth Amendment, '[i]t cannot be presumed that any clause in the constitution is intended to be without effect.' *Marbury v. Madison,* 1 Cranch 137, 174, 2 L.Ed. 60, 72. In interpreting the Constitution, 'real effect should be given to all the words it uses.' *Myers v. United States,* 272 US 52, 151, 71 L.Ed. 160, 180, 47 S.Ct. 21.

> The Ninth Amendment to the Constitution may be regarded by some as a recent discovery and may be forgotten by others, but since 1791 it has been a basic part of the Constitution which we are sworn to uphold. To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and give it no effect whatsoever. Moreover, a judicial construction that this fundamental right is not protected by the Constitution because it is not mentioned in explicit terms by one of the first eight amendments or elsewhere in the Constitution would violate the Ninth Amendment. . . .

Justice Goldberg added at 493-94:

> In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the "traditional and [collective] conscience of our people" to determine whether a principle is "so rooted [there] . . . as to be ranked as fundamental." *Snyder v. Massachusetts,* 291 US 97, . . . The inquiry is whether a right involved is "of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.' . . . ." *Powell v. Alabama,* 287 US 45 . . . "Liberty" also "gains content from the emanations of . . . specific [constitutional] guarantees" and "from experience with the requirements of a free society." *Poe v. Ullman,* 367 US 497 . . . (dissenting opinion of Mr. Justice Douglas).

Relying in part upon this lengthy discussion of the importance of the Ninth Amendment by Justice Goldberg, a majority of this Court in *Roe v. Wade,* 410 US 113, 153 that: "This right of privacy, whether it be founded in the Fourteenth Amendments concept of personal liberty and restrictions upon state action, as we feel it is, or as the District Court determined,

in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether to determine her pregnancy." This recognizes that people, and not only states, have rights under the Ninth Amendment.

The People respectfully offer that because *People v. Nelson* contravenes the Ninth and Fourteenth Amendment rights of public safety for the citizens of New York State and it must be declared unconstitutional.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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3 No. 488 The People &c., Respondent, v. Wayne T. Nelson, Appellant.	Order reversed, judgment of conviction and plea vacated, motion to suppress granted and case remitted to Albany County Court for further proceedings on the indictment for reasons stated in the dissenting memorandum of Justice Ann T. Mikoll at the Appellate Division (83 AD2d 689-690). Chief Judge Cooke and Judges Jasen, Jones, Wachtler, Fuchsberg and Meyer concur. Judge Gabrielli took no part.
4 No. 482 The People &c., Respondent, v. Angelo Nuccie, Appellant.	Order affirmed in a memorandum. Chief Judge Cooke and Judges Jasen, Jones, Wachtler, Fuchsberg and Meyer concur. Judge Gabrielli took no part.
2 No. 475 The People &c., Respondent, v. Eric Parker, Respondent.	Order affirmed for reasons stated in the opinion by former Justice James D. Hopkins at the Appellate Division (82 AD2d 661). Chief Judge Cooke and Judges Jasen, Jones, Wachtler, Fuchsberg and Meyer concur. Judge Gabrielli took no part.
4 No. 483 The People &c., Respondent, v. Vicki Parker, Appellant.	Order reversed and a new trial ordered. Opinion by Judge Wachtler. Chief Judge Cooke and Judges Jasen, Jones, Fuchsberg and Meyer concur. Judge Gabrielli took no part.
1 No. 490 The People &c., Respondent, v. Michael Rooney, Appellant.	Order affirmed in a memorandum. Chief Judge Cooke and Judges Jasen, Jones, Wachtler, Fuchsberg and Meyer concur. Judge Gabrielli took no part.
AppT No. 474 The People &c., Respondent, v. ????????, Appellant.	Order reversed and a new trial ordered in a memorandum. Chief Judge Cooke and Judges Jasen, Jones, Wachtler, Fuchsberg and Meyer concur. Judge Gabrielli took no part.

Remittitur

Court of Appeals
State of New York

The Hon. Lawrence H. Cooke, Chief Judge, Presiding

3 No. 488

The People &c.,

Respondent,

v.

Wayne T. Nelson,

Appellant.

The appellant(s) in the above entitled appeal appeared by Ungerman and Ackerman; *the respondent(s) appeared by* Sol Greenberg, District Attorney, Albany County.

The Court, after due deliberation, orders and adjudges that the order is reversed, judgment of conviction and plea vacated, motion to suppress granted and case remitted to Albany County Court for further proceedings on the indictment for reasons stated in the dissenting memorandum of Justice Ann T. Mikoll at the Appellate Division (83 AD2d 689-690). Chief Judge Cooke and Judges Jasen, Jones, Wachtler, Fuchsberg and Meyer concur. Judge Gabrielli took no part.

STATE OF NEW YORK
COUNTY OF ALBANY CLERK'S OFFICE } ss.:

I, GUY D. PAQUIN, Clerk of the said County, and also Clerk of the Supreme and County Courts, being Courts of Record held therein, DO HEREBY CERTIFY that I have compared the annexed copy Remittitur with the original thereof

filed in this office on the 8 day of Oct 1982 and that the same is a correct transcript therefrom, and of the whole of said original.

IN TESTIMONY WHEREOF, I have hereunto set my name and affixed my official seal, this 26 day of Oct 1982

/s/ GUY D. PAQUIN,
Clerk

(SEAL)

* * * court in deference to New York authorities, and the majority's gratuitous remark to that effect is both unnecessary and inappropriate to its resolution of this appeal.

2 THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, v WAYNE T. NELSON, Appellant. — Appeal from a judgment of the County Court of Albany County (Clyne, J.), rendered December 4, 1979, convicting defendant upon his plea of guilty of the crime of criminal possession of a controlled substance in the third degree. Judgment affirmed. No opinion. Kane, J.P., Main, Casey and Yesawich, Jr., JJ., concur; Mikoll, J., dissents and votes to reverse in the following memorandum.

Mikoll, J. (dissenting). I respectfully dissent. At about 8:00 P.M. on March 21, 1979, defendant was observed walking in a northerly direction along the west side of Morningside Drive in Guilderland. It was a cold night. The street was unlighted and visibility, according to Trooper Guiry, was very difficult. The troopers, proceeding in the same direction in an unmarked police vehicle, observed defendant from the rear and from the east side of the street. He wore a corduroy coat. The troopers noted that defendant walked in a hunched manner, the shoulders of his jacket raised up and his chin buried within. There were bulges on both sides of the jacket underneath the arms. The troopers pulled across the street alongside defendant and Trooper Guiry shined a spotlight on the ground and said, "Hi, how are you? What is your name?" Defendant identified himself and looked up and down the street. The trooper exited the vehicle, shined a flashlight on defendant, asked for more identification and, thereupon, noticed a plastic bag containing vegetation protruding from defendant's left chest pocket. The trooper told defendant to empty his pocket. Defendant refused to do so whereupon the trooper told him he was under arrest and physically subdued him when defendant attempted to resist the search. Three other plastic bags with vegetation were seized

from his person and, upon a subsequent search, a foil wrapper containing pink pills was found. The trial court denied defendant's motion to suppress the fruits of the search. In its decision, the court held that the trooper was justified in making the initial stop and inquiry of defendant and, upon observing a bag containing green vegetation, was justified in ordering defendant to empty his pockets. The court concluded that defendant's refusal to do so justified the trooper's subsequent action of physically overcoming defendant's resistance to the search. In support of its decision, the court cited *People v Corrado* (22 NY2d 308). It is revealing to note that there the Court of Appeals reversed the conviction of the defendant where police, acting on a tip from an undercover police officer that marihuana would be passed at a given time and location, set up a stakeout. The police viewed an exchange of manila envelopes between two cars at the given location and time. The court held that the forcible stop of defendant's car and its search were unjustified since the circumstances did not entitle the police to draw an inference of criminality. The *Corrado* case lends no support to the decision of the trial court but leads rather to the contrary conclusion that the innocuous circumstances of the instant case did not justify the stop and search of the defendant. In an incisive pronouncement on the question of an officer's right to make inquiry of private citizens for information in the absence of any concrete indication of criminality, the Court of Appeals in *People v. De Bour* (40 NY2d 210) stated that there must be some articulable reason sufficient to justify the police action which was undertaken. When police officers are engaged in their criminal law enforcement function, their ability to approach people is circumscribed by the manner and intensity of the interference, the gravity of the crime involved and the circumstances attending the encounter. Thus, to be considered first is the question of whether or not the

police action was justified in its inception and, secondly, whether or not that action was reasonably related in scope to the circumstances which render its initiation permissible. The police may not justify a stop by subsequently acquired suspicion resulting from the stop. In the instant case, there was nothing to arouse police interest in the defendant. There was no reported criminal activity afoot, the area was not one of high incidence of crime, the hour was early and defendant's walk and manner of dress were entirely normal and appropriate for a brisk March night. The bulge under defendant's arms was an insignificant circumstance. I conclude that the police had no reason to stop defendant. The subsequent sighting of contraband by the officer which obviously justified his hunch or suspicion of the defendant cannot be used as the exoneration for the initial illegal stop (*People v Howard*, 50 NY2d 583). The motion to suppress should be granted.

STATE OF NEW YORK
COUNTY COURT COUNTY OF ALBANY

THE PEOPLE OF THE STATE OF NEW YORK

against

WAYNE NELSON,

Defendant.

APPEARANCES: OF COUNSEL:

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CLYNE, J. This is a motion by the defendant to suppress certain tangible property.

On March 21, 1979 at about 8:00 P.M. Trooper Guiry, a uniformed New York State Police Officer, was cruising northbound on Morningside Drive, a residential area in the Town of Guilderland in an unmarked police vehicle, and accompanied by Trooper Bare, when he observed the defendant walking in a northerly direction on the west side of the roadway in a hunched position. The defendant had a brown corduroy coat on with the shoulders up in the air, his head down, with his chin buried in his chest and there were bulges on both sides of the jacket underneath the arms. There were no street lights on the street and visibility was poor. The officer put on the high beams of the vehicle and pulled alongside the defendant. Trooper

Guiry threw the spotlight on the ground and stated to defendant, "Hi, how are you". The trooper then stated, "What is your name?" Defendant turned toward the officer and stated "My name is Wayne Nelson" and started looking up and down the street. Trooper Guiry exited the vehicle and threw the beam of his flashlight on the defendant and asked for I.D. As he put the light onto the defendant he noticed a large plastic bag containing green vegetation protruding from defendant's left chest pocket. The officer asked defendant to empty his pocket on the hood of the car. Defendant refused. Trooper Guiry stated that he was under arrest, a struggle ensued. Defendant was handcuffed and a search of his body revealed three more plastic bags containing a quantity of green vegetation. The plastic bags and contents were received in evidence at the hearing and the court takes note of the size and shape of the bags. In brief, they were not small. A further search at police headquarters revealed additional matter.

The foregoing constitutes findings of fact.

It is the court's conclusion of law that under the circumstances set forth above the officer was justified in making the initial inquiry and upon observing a bag containing green vegetation protruding from defendant's pocket was justified in requesting defendant empty his pockets (*People* v. *Corrado*, 22 NY2d 308). Defendant's refusal justified the trooper's subsequent action and the search and seizure of the property sought to be suppressed. Accordingly, the motion to suppress is denied.

This constitutes the decision and order of this court.

Dated: Albany, New York
November 12, 1979

/s/ JOHN J. CLYNE
Albany County Judge

82-930

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

PEOPLE OF THE STATE OF NEW YORK, PETITIONER

v.

WAYNE T. NELSON

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the decision of the New York State Court of Appeals, People v. Nelson, violate the Fourth Amendment of the United States Constitution?

QUESTION PRESENTED

Does the decision of the New York State Court of Appeals, People v. Nelson, violate the Fourth Amendment of the United States Constitution?

STATEMENT OF FACTS

On the night of March 21, 1979, respondent was walking in a northerly direction along the west side of Morningside Drive in a low crime, residential area of the Town of Guilderland. There were no sidewalks or streetlights along this section of Morningside Drive. It was a cold night, and respondent was walking in a hunched manner, chin down into his chest and shoulders up in an effort to protect his face and ears from the cold. Respondent was hatless and wearing a light corduroy jacket with both breast pockets buttoned or snapped.

At approximately 8 p.m. on this night, respondent was observed by the State Police in the persons of uniformed officers Trooper Michael Guiry and Trooper Recruit Charles Bare. The troopers had not received any reports of criminal activity in the area of Morningside Drive prior to observing respondent, nor had they observed respondent committing a particular crime. Respondent was walking unhurriedly and did not exhibit any furtive behavior at this time. Trooper Guiry testified that the hunched posture in which respondent was walking was suspicious, and from his position, some thirty feet behind respondent on a dark road, observed two bulges under the armpits of respondent's jacket.

Based on these observations, the troopers decided to stop respondent. Crossing into the oncoming traffic lane, the unmarked patrol car pulled within inches of his leg, thus preventing respondent's forward progress. Trooper Guiry asked re-

spondent to stop, and then asked respondent his name. Respondent stopped, turned and faced the car. He then stepped back and answered, "My name is Wayne Nelson." Respondent testified at the suppression hearing that Trooper Guiry had already known his name from previous encounters.

At the time of the seizure respondent did not attempt to dispose or secrete any articles in his possession, but he did look once to the right and once to the left, whereupon Trooper Guiry quickly exited the patrol car and was immediately followed by Trooper Bare. Trooper Guiry, with flashlight in hand, positioned himself on the left side of respondent; the other officer positioned himself on respondent's right side effectively seizing and surrounding him. Respondent was ordered to show the officers some identification. While respondent reached for his wallet, Officer Guiry noticed a bulge in the left-hand breast pocket of respondent's jacket and demanded that the pocket be emptied on the hood of the patrol car. Respondent refused to empty his pocket, whereupon his arms were grabbed by both officers. A short struggle ensued, and respondent was restrained face down on the hood of the patrol car. Thereupon, respondent was told he was under arrest; Trooper Guiry then unbuttoned the left breast pocket and removed a plastic bag containing a quantity of marijuana. At no time was any part of this bag exposed to plain view. Later at the State Police satellite station in the town of Guilderland, respondent was searched and a quantity of lysergic acid diethylamide was discovered in his possession.

POINT I

THE DECISION OF THE NEW YORK STATE COURT OF APPEALS, PEOPLE V. NELSON, DOES NOT VIOLATE THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

A. The Decision of the New York State Court of Appeals, People v. Nelson, was based upon Article I, Section 12 of the New York State Constitution.

Although the operative language of Article I, Section 12 of the New York State Constitution is identical to the language of the Fourth Amendment to the United States Constitution, there is of course nothing unprecedented or unique in a sovereign state's assertion of its privilege to more stringently safeguard individual rights. The United States Supreme Court has repeatedly maintained that the Federal Constitution establishes only a base level of protection for indivudal rights and that "a State is free as a matter of its own law to impose greater restrictions on police activity." (Oregon v. Hass, 420 U.S. 714, 719.) Thus, so long as freedom of the individual is thereby enlarged rather than diminished, recourse to State Constitutions for the vindication of individual rights is permitted and indeed mandated by our federalist system.

New York has not hesitated to avail itself of this fundamental principle of federalism. (See, People v. Elwell, 50 N.Y.2d 231, 235; People v. Hobson, 39 N.Y.2d 479; Sharrock v. Dell Buick-Cadillac, 45 N.Y.2d 152, 159-161; People v. Isaacson, 44 N.Y.2d 511.) The accelerating pace at which states have come to rely on their own Constitutions is the result of the some-

what corresponding increase in the number of instances "in which important conceptual shifts or troublesome indecision by the Supreme Court has disturbed the symmetry of State law whose design had been influencedby the Federal Constitution alone." (People v. Belton, 55 N.Y.2d 49, 61; dissenting op. per Fuchsberg, J.)

Contrary to the Appellant's assertion that Article I, Section 12 of the New York State Constitution has never been interpreted as providing greater protection than the Fourth Amendment of the United States Constitution, the New York Court of Appeals recently concluded that to the extent Spinelli v. United States (393 U.S. 40) and Draper v. United States (358 U.S. 307) may be read as imposing a less stringent test under the Fourth Amendment to the United States Constitution, Section 12 of Article I of the New York State Constitution is not construed similarly. (People v. Elwell, 50 N.Y.2d 231, 241.)

More importantly, in People v. DeBour (40 N.Y.2d 210) which presented an issue similar to the one at bar, the New York Court of Appeals drastically departed from the United States Supreme Court's traditional search and seizure analysis. DeBour treated the police-initiated encounter as a continuum, subject to constitutional scrutiny from the moment of approach to the arrest or clear seizure, and it postulated two distinct levels of interference below the level of a seizure. Thus, if it is based upon the United States Constitution, the DeBour opinion rests on extremely tenuous foundation for the Court of Appeals' apparent theory that constitutional recognition will be given to a continuum from point of contact through to ultimate arrest has been

severely eroded by Dunaway v. New York (442 U.S. 200) and Michigan v. Summers (101 S.Ct. 2587).

The immediate significance of Dunaway to DeBour reasoning is that the Supreme Court does not view the process of seizure as a continuum and that the Supreme Court does not think that sliding scale standards are helpful in guiding the police (United States v. Mendehall, 446 U.S. 544; Reid v. Georgia, 448 U.S. 438). Accordingly, the New York Court of Appeals' strict adherence to the sliding scale rationale to analyze investigatory detentions on less than probable cause can only be justified by reliance on Article I, Section 12 of the New York State Constitution.

B. The Fourth Amendment of the United States Constitution requires an individualized suspicion on the basis of articulable facts before an officer can detain an individual on less than probable cause.

In Terry v. Ohio (392 U.S. 1), the Supreme Court recast a fifty-year-old constitutional process of determining the sufficient level of probability to justify police action. Terry freed Fourth Amendment analysis from the rigidity of the probable cause standard, but in doing so, it introduced a certain amorphousness. To give it shape, the Court imposed several limitations on police discretion making it clear that, although less than probable cause sufficed to justify certain "lesser" intrusions, police action must be based on at least "specific articulable facts which, taken together with rational inferences

from those facts, reasonably warrant that intrusion." Id. at 21. An officer's "inchoate and unparticularized suspicion or 'hunch'" would not suffice. Id. at 27. Thus was born "reasonable suspicion," a new probability standard requiring less than probable cause, but more than a hunch; applying where the governmental intrusion was less than a full search; and being used because a specific governmental interest necessitated the intrusion.

The narrow scope of Terry was carefully maintained by its progeny. In Adams v. Williams (407 U.S. 143), the Supreme Court applied the Terry analysis to a frisk for weapons on the basis of a reasonable suspicion created by an informant's tip. Similarly, in Pennsylvania v. Mimms (434 U.S. 106), the Court upheld a frisk for weapons when an officer observed a bulge in the jacket of a man who had been ordered out of his car after being stopped for a traffic violation. As a result, the Terry exception was confined to situations where the detaining officer's safety was in question.

The second exception to the probable cause requirement for nonarrest seizures was created in what are commonly referred to as the border patrol cases. (United States v. Brignoni-Ponce, 422 U.S. 873; United States v. Martinez-Fuerte, 428 U.S. 543; United States v. Cortez, 101 S. Ct. 690.) The Brignoni-Ponce Court confronted the issue of vehicle stops made by roving border patrol agents on less than probable cause. Due to the unique law enforcement problems attending the patrol of the two-thousand mile open border with Mexico, the Court held that the Fourth Amendment does not require probable cause for border patrol stops

to ascertain citizenship (422 U.S. at 880). Nonetheless, the Court maintained that such stops had to be justified by specific and articulable facts supporting a reasonable belief that the vehicle contained illegal aliens. Id. at 883.

This demand for an articulable suspicion was reiterated by Chief Justice Burger's analysis in United States v. Cortez (101 S.Ct. 690). First, he reasoned that the "totality of the circumstances--the whole picture..." must be assessed on a practical level by law enforcement officers, and second, that their assessment must yield a particularized suspicion that the person to be detained is engaged in criminal activity. Id. at 695. While the facts of Cortez fit neatly under the border patrol exception, this Court's recent decision in Michigan v. Summers (101 S.Ct. 2587) cites Cortez as supporting the proposition that brief detentions of suspicious individuals for the purpose of "freezing" the situation while police conduct further inquiry may be reasonable under particular circumstances. Id. at 2591-92.

The Summers Court's retreat from the categorical approach of Terry to the "whole picture" analysis of Cortez created the need for a specific rule regarding the reasonableness of nonarrest seizures. The three broad criteria established by the Summers Court require that the intrusion of the seizure: (1) Must be limited in terms of time and extent; (2) must be justified by substantial law enforcement interests; and (3) must be related to the person seized by articulable facts which create a reasonable basis for suspecting criminal activity (101 S.Ct. 2587, 2592).

While the Court's narrow holding in Summers pertained to situations in which a seizure was effected pursuant to a valid search warrant for contraband, the three criteria established by the Court indicate that the case signals a departure from the traditional notions of constitutional seizures and represents a new standard for nonarrest detentions founded on less than probable cause. Nevertheless, the Court has not retreated from its mandate that there must be an individualized suspicion on the basis of articulable facts before an officer can detain an individual on less than probable cause. Reasonable suspicion must be maintained as a meaningful standard of probability. The Terry Court recognized that, unless such an objective standard is respected, no principled limitation would exist on the capacity of the police to accost our citizens and a critical bulwark of liberty would be lost.

C. Respondent's Fourth Amendment Rights were violated when he was detained and seized without any reasonable suspicion or on the basis of any articulable facts.

The critical question in this case is whether the initial investigative detention of respondent was justified by anything other than subjective hunch. The real question still is whether the police have the right in general to detain for investigation, or to otherwise invade privacy, on reasonable suspicion but without probable cause to arrest. As a matter of form, this may require pinpointing the stage of the encounter

at which the seizure occurs, but in substance it requires a decision as to the level of interference with a person's right to be let alone that we are willing to tolerate before judicial scrutiny is applied to determine the reasonableness of the basis for the interference.

As previously noted, the Summers rule holds that detentions on less than probable cause may be permissible if they are of limited nature, promote legitimate law enforcement interests, and are based on an articulable and individualized suspicion. Measured by these criteria, there was no reason for the police to confront the respondent. They lacked "probable cause," "reasonable cause," or, for that matter, any cause for his detention as he walked along the street minding his own business. For, even if it be postulated that less evidence is needed to supply cause for a brief on-the-street detention, there still must be a recognizable and justifiable cause, to wit: An articulable and individualized suspicion.

In the instant case there was a complete absence of any rationale for the officers' conduct, irrespective of whether such rationale could ever be a permissible basis for a compelled stop or not. Nelson was alone. He was on a public street in a low crime, residential area. The two policemen who accosted him had received no report that any crime had been committed, was being committed or was about to be committed, nor did they have "reasonable grounds" to suspect Nelson of having committed one.*

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*Such are the minimal requirements of the New York's "stop-and-frisk" statute (Criminal Procedure Law, Section 140.50).

They were engaged in no ongoing search for a specific suspect whether resembling the respondent or not, and they had not the slightest impression that respondent might be armed. There was nothing conspicuous, hurried or furtive in his walk either before or after the officers approached him. Nor was there anything unusual in his attire. He carried no packages or other objects which could possibly invite curiosity. He had not loitered or engaged in any suspicious conduct. He did not try to avoid the officers as they approached him. Though the police never gave him any reason for stopping and questioning him, he answered all their questions responsively and obeyed their demand for identification. He had not been seen to violate any ordinance or other law. Nor was there any claim of a high incidence of drugs in the area where Nelson was stopped. Consequently, there was no degree of belief reasonably generated on which could be founded suspicion "that criminal activity may be afoot" (Terry v. Ohio, 392 U.S. 1, 30).

In short, the accosting, stopping and detention of Nelson when it occurred, and assuming it was not undertaken simply as an act of harassment, can have been nothing but "the product of a volatile or inventive imagination" (Terry v. Ohio, 392 U.S. 1, 28) instead of the articulable suspicion of criminal activity that is the required precondition to any inteference by the police with a citizen's freedom of movement.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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82-930

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

PEOPLE OF THE STATE OF NEW YORK, PETITIONER

v.

WAYNE T. NELSON

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN OPPOSITION TO THE GRANTING OF A WRIT OF CERTIORARI IN FORMA PAUPERIS

STATE OF NEW YORK)
COUNTY OF ALBANY) ss.:

I, WAYNE NELSON, being first duly sworn, depose and say that I am the respondent, in the above-entitled case; that in support of my motion to proceed in opposition to the granting of a Writ of Certiorari without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present on appeal are the following:

The New York State Court of Appeals was correct in its decision granting my motion to suppress certain evidence which was seized in violation of both my state and federal constitutional rights.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

Q 1. Are you presently employed?

A No, I have been incarcerated for the previous 4 years.

Q 2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

A No.

Q 3. Do you own any cash or checking or savings accounts?

A No.

Q 4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

A No.

Q 5. List the persons who are dependent upon you for support and state your relationship to those persons.

A None.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Wayne T. Nelson
WAYNE T. NELSON

Subscribed and sworn to before me this 15th day of February, 1983.

J. Stanton Lieberman
Notary Public, State of New York
Comm. Expires 3/30/84

Let the applicant proceed without prepayment of costs or fees or the necessity of giving security therefor.

UNITED STATES SUPREME COURT JUSTICE